

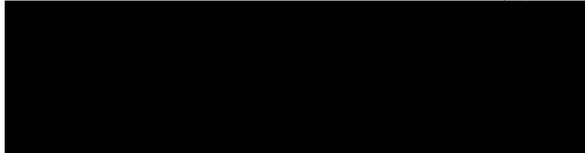
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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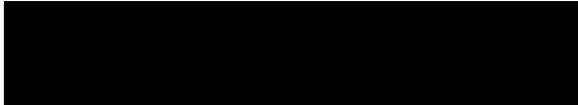
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
CIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536



File: EAC 98 144 52617 Office: VERMONT SERVICE CENTER

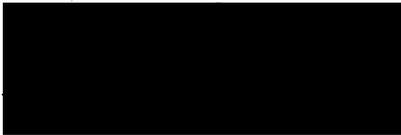
Date: **NOV 05 2003**

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



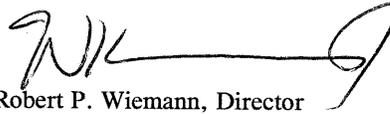
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. A motion to reopen was granted, but the director again denied the petition on the merits. The petitioner filed an appeal, which was dismissed on the merits by the Administrative Appeals Office (AAO). The petitioner then filed a motion to "reopen and reconsider" the AAO's decision. The AAO granted the motion, which it treated as a motion to reopen, but affirmed its "previous decision" dismissing the appeal. The new decision was based on an unrelated factual situation, however, indicating that the case file must have been mixed up with another. The petitioner pointed this out in a second motion to "reopen and reconsider," which is now before the AAO.

The instant motion will be granted as a motion to reopen the AAO's last decision, and that decision will be withdrawn as erroneous. But the motion to reopen provides no legal rationale for overturning the AAO's initial decision dismissing the appeal on the merits. Nor did the petitioner's prior motion to "reopen and reconsider" the AAO's initial decision satisfy the regulatory requirements for reopening or reconsidering the decision. Accordingly, the initial decision of the AAO will be affirmed and the appeal will be dismissed.

The petitioner seeks to extend the beneficiary's classification as a nonimmigrant temporary worker in the United States - specifically, an intracompany transferee (L-1A manager or executive) - pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). In denying the petition the director determined that the petitioner was not doing business and that the beneficiary had not been and would not be working primarily in a managerial or executive capacity. Upon review the AAO affirmed these findings and dismissed the appeal.

To establish a beneficiary's L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

When, as in the instant case, a petitioner seeks to extend a beneficiary's L-1 classification beyond the time period granted under an initial "new office" petition, 8 C.F.R. § 214.2(1)(14)(ii) provides that the "new office extension"

petition must be accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the record establishes that (1) the petitioner was "doing business" as defined in the regulations and (2) the beneficiary has been and will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), and the corresponding regulation, 8 C.F.R. § 214.2(l)(1)(ii)(B), provide as follows:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization),

or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed, and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), and the corresponding regulation, 8 C.F.R. § 214.2(l)(1)(ii)(C), provide as follows:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner, Intercontinental Imex Corporation, is a trading company engaged in the import and export of selected household merchandise. The petitioner was incorporated in the State of New York on October 21, 1996, and is a wholly-owned subsidiary of [REDACTED] Ltd., a company incorporated in Singapore on March 26, 1991. The beneficiary, [REDACTED] began working for the Singaporean company in May 1991 and became its managing director in June 1992. He was subsequently selected to set up the company's "new office" in the United States, the petitioner herein, and received an L-1A visa classification on April 18, 1997, valid for one year. On April 17, 1998, the petitioner filed a petition to extend the beneficiary's L-1A classification for one additional year, at a salary of \$25,000, to continue working as president of the U.S. subsidiary. The petition was denied by the director on August 21, 1998, for a variety of evidentiary reasons.

In September 1998 the petitioner filed a motion to "reopen and reconsider" the decision, accompanied by additional documentation designed to fill the evidentiary gaps and address the specific

issues that were discussed in the decision.

As a technical matter, there is no "motion to reopen and reconsider" under the regulations. A "motion to reopen" and a "motion to reconsider" are two separate actions, the requirements for which are set forth in 8 C.F.R. § 103.5(a)(2) and 103.5(a)(3), respectively. The regulations provide, in pertinent part, as follows:

A motion to reopen must state the *new facts* to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an *incorrect application of law or Service policy*. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(Emphases added.) Thus, the distinction between the two motions is that a motion to reopen is fact-based, requesting that the law be applied to a new set of facts, whereas a motion to reconsider is based on law, requesting that the law be interpreted and applied differently to the same set of facts.

The petitioner's motion of September 1998 fulfilled the requirements of a motion to reopen, and it was so considered by the director. By decision dated October 30, 1998, the director granted the motion to reopen, but affirmed his previous decision denying the petition. As grounds for the denial the director stated that the record still did not establish (a) that the beneficiary had been or would be functioning in an executive or managerial capacity, (b) that the beneficiary had a subordinate staff of professional or supervisory personnel to relieve him from performing non-qualifying duties, or (c) that the "business has advanced from the infant stage to an on going viable company, complete with employees, cash flow and business activity."

The petitioner filed a timely appeal, asserting that (1) the record established the beneficiary's entitlement to L-1 status, (2) the beneficiary had the requisite one-year experience as a manager or executive with the Singaporean company, (3) the record established a qualifying relationship between the Singaporean company and the petitioner, and (4) the delay in establishing the petitioner's U.S. operation was caused by the beneficiary's long wait for his L-1 visa to be issued, during which time he could not enter the United States. The petitioner supplemented the appeal with a legal brief, explaining that although L-1 status was approved for the beneficiary on April 18, 1997, it was not until five months later,

in September 1987, that the beneficiary was able to obtain his L-1 visa. So he did not enter the United States to begin his employment with the petitioner until September 26, 1997, giving him less than seven months of effective work time on his one-year visa. According to the petitioner, the beneficiary's employment by the Singaporean company as "managing director" since June 1992 fulfilled the requirement of having worked a minimum of one year in a qualifying managerial or executive capacity with the foreign parent. The petitioner also asserted that the evidence previously submitted demonstrated that the petitioner was the wholly-owned subsidiary of the Singaporean company, thereby establishing a qualifying relationship between the U.S. and foreign companies as required in section 101(a)(15)(L) of the Act, that the parent company was engaged in "the regular, systematic, and continuous provision of goods and/or services" - i.e., "doing business" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) - and that any failure of the U.S. subsidiary in this regard was due to the delay in the issuance of the beneficiary's L-1 visa and the uncertainty of his future status.

By decision dated August 6, 1999, the AAO dismissed the petitioner's appeal. The AAO did acknowledge that the evidence of record was sufficient to establish the parent-subsidiary relationship between the Singaporean company and the petitioner, thereby satisfying the qualifying relationship requirement of the Act. The AAO also acknowledged that the record contained sufficient evidence that the Singaporean parent was "doing business," but indicated that no additional information had been provided by the petitioner to demonstrate that the U.S. subsidiary was likewise engaged in the regular, systematic, and continuous provision of goods or services. Accordingly, the record provided no basis to overturn the director's finding that the petitioner was not "doing business," as required in 8 C.F.R. § 214.2(l)(14)(ii)(B) to extend the beneficiary's L-1 status. On this basis alone the AAO stated that the petition could not be approved.

The AAO also reviewed the evidence as to whether the beneficiary had been and would be employed in a primarily managerial or executive capacity, as required under section 101(a)(15)(L) of the Act. The most extensive description of the beneficiary's job duties had been provided in a letter dated September 6, 1998, from [REDACTED] part owner of the Singaporean parent and a director of the U.S. subsidiary. This letter accompanied the documentation submitted by the petitioner in support of its initial motion to "reopen and reconsider," which was filed after the director's original decision of August 21, 1998. As described in the letter, the beneficiary was transferred to the United States to set up the new office, hire U.S. employees, and run the business. The beneficiary's responsibilities included such activities as chairing management meetings, reviewing periodic business reports, deciding which products to market, interviewing, hiring and training new employees, negotiating business contracts, and

representing the company on business trips. In addition, the beneficiary was responsible for instituting personnel procedures and overseeing recruitment, developing a system to analyze and synthesize business-related data, ensuring effective controls for the dissemination of financial information, issuing payment instructions and signing checks, advising subordinates on problem resolution, monitoring and controlling records to ensure compliance with governing laws and regulations, reviewing and approving all financial records, and maintaining the company's ethical standards.

In the judgment of the AAO, the beneficiary's job duties, as described in the record, were too general to explain what the beneficiary actually did on a daily basis, and did not indicate that a majority of the beneficiary's time was spent on managerial or executive functions. The described duties, the AAO determined, did not demonstrate that the beneficiary had been or would be managing or directing the management of a function, department, or other subunit of the company, or that he functioned at a senior level within the organizational hierarchy. Nor did the evidence show that the beneficiary had been or would be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. In accordance with the director's finding, therefore, the AAO concluded that the record failed to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. For this additional reason, the AAO stated, the petition could not be approved.

By letter dated September 3, 1999, the petitioner filed a "motion to reopen and reconsider" the case. In its letter the petitioner addressed the two grounds for the AAO's dismissal of the appeal: (1) that the petitioner did not satisfy the regulatory requirement of "doing business" and (2) that the beneficiary was not employed in a managerial or executive capacity. The petitioner did not offer any new facts or documentation, nor cite any errors of law or pertinent precedent decisions, with respect to either issue. On the issue of "doing business" the petitioner merely reiterated its contention that the U.S. business failed to achieve its targets during the one-year "new office" period in large part because of the beneficiary's absence resulting from the delayed issuance of his L-1A visa. On the issue of "managerial or executive capacity" the petitioner referred to the documentation already in the record and asserted that the beneficiary's duties as described therein met the statutory requirements of 8 U.S.C. § 1101(a)(44)(B) for employment in an "executive capacity." The petitioner restated the beneficiary's job duties in general terms such as "direct[ing] the management of the entity," setting goals and policies, "act[ing] as high decision maker of the company," and "report[ing] to [the] board of directors and shareholders of the organization." This description of duties simply paraphrases the statutory definition of "executive capacity."

On March 6, 2002, the AAO issued a decision which purported to rule on the petitioner's motion of September 1999. The AAO stated that it was granting the petitioner's "motion to reopen," but affirming the "previous decision" of the AAO and denying the petition. A reading of the decision clearly indicates, however, that it did not apply to the petitioner's case. The petitioner is described in the decision as "a foreign law consulting company" primarily engaged in providing "legal consulting services concerning legal matters in China," and the "previous decision" discussed therein was issued by the AAO on March 28, 2000, not August 6, 1999, as in the instant case. It is obvious that the case file on which the AAO decision of March 6, 2002, is based was not the case file of the instant petitioner, International Imex Corporation.

On April 4, 2002, the petitioner filed a second "motion to reopen and reconsider" with the AAO, pointing out that the March 2002 decision "was based on erroneous information." Insofar as the motion cites the incorrect facts on which the AAO decision was based and reiterates the actual facts at issue in this case, the AAO determines that the petitioner's latest motion constitutes a valid motion to reopen under 8 C.F.R. § 103.5(a)(2). The motion will be granted, and the AAO decision dated March 6, 2002, because it was based on erroneous facts, will be withdrawn. This means that the initial decision of the AAO denying the petitioner's appeal, dated August 6, 1999, is the last valid decision in this case and there has been no proper ruling on the petitioner's motion to "reopen and reconsider" from September 1999.

Thus, there are currently two motions before the AAO, filed in April 2002 and September 1999. Like the 1999 motion, the 2002 motion was not supplemented with any additional documentation to augment the factual record and did not cite any errors of law or pertinent precedent decisions. Like the 1999 motion, the 2002 motion reiterated the beneficiary's job duties with the petitioner in broad terminology that added nothing of substance to the record. The beneficiary was described as the "managing director" who is "directly responsible for overseeing the day-to-day operations of the company," and whose duties include "holding meetings, making decisions on the products to be imported or exported, as well as interviewing and hiring personnel." Unlike the 1999 motion, the 2002 motion did not even address the issue of whether the petitioner met the regulatory requirements of "doing business."

Whether viewed as motions to reopen or motions to reconsider, neither motion provides a valid rationale for overturning the AAO's decision of August 6, 1999. A motion to reopen "must . . . be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2) (emphasis added). No such materials were submitted by the petitioner with either motion. A motion to reconsider "must state the reasons . . . and be supported by any pertinent precedent decisions" showing "an incorrect application of law or Service policy." 8 C.F.R. § 103.5(a)(3) (emphasis added). The petitioner

did not cite any precedent decisions or other legal authority at variance with the AAO's 1999 decision in either motion, nor offer any other valid reason for overturning the decision.

Rulings on motions to reopen or reconsider a decision are discretionary. As stated in the regulation, "when the affected party files a motion, the official having jurisdiction *may, for proper cause shown*, reopen the proceeding or reconsider the prior decision." 8 C.F.R. § 103.5(a)(1)(i) (emphasis added). Proper cause was shown in the petitioner's motion of April 2002, as discussed, to reopen the proceeding and withdraw the AAO's erroneous decision of March 6, 2002. However, neither of the two motions filed in September 1999 and April 2002 were accompanied by any of the documentary evidence required in the regulations to support a motion to reopen or a motion to reconsider the AAO's prior decision of August 6, 1999. Nor did either motion present a valid rationale to overturn that decision. Thus, the petitioner has not "shown proper cause" to reopen or reconsider the AAO decision of August 6, 1999.

Accordingly, the AAO decision of August 6, 1999, will be affirmed and the petition will be denied.

In visa petition proceedings the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden in this case.

ORDER: The AAO decision dated March 6, 2002, is withdrawn. The initial decision of the AAO, dated August 6, 1999, is affirmed. The petition is denied.